Truck Drivers Local Union No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America; and Al Sgaglione, Executive Administrator of the New York State Teamsters Conference Pension & Retirement Fund, Irving Wisch, Kepler Vincent, T. Edward Nolan, Rocco F. DePerno, Victor Mousseau, Paul E. Bush, Jack Canzoneri, Trustees of the New York State Teamsters Conference Pension & Retirement Fund, Acting as Agents *and* Universal Liquor Corp. and Erie Liquor Co., Inc. Cases 3–CB–3688 and 3–CB–3690

December 16, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On September 18, 1981, Administrative Law Judge Marvin Roth issued the attached Decision in this proceeding. Thereafter, the Charging Parties[1] filed exceptions and a supporting brief. The General Counsel filed cross-exceptions and a brief in support thereof.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

We find that Respondents have violated Section 8(b)(3) of the Act[2] by attempting to modify the provisions of collective-bargaining agreements between the Union and the Charging Parties. In particular, we find that the Union attempted to force the Charging Parties to make pension fund contributions not required by the terms of the collective-bargaining agreements on behalf of their seasonal, casual, and part-time employees, and that the trustees of the pension fund acted as agents of the Union in this endeavor.

The Facts

The facts of the case are undisputed.

The Charging Parties, Universal Liquor Corp. and Erie Liquor Co., Inc., are engaged in the wholesale distribution of liquor and wine in upstate New York. The bargaining unit at each firm presently consists solely of warehousemen.[3] The unit at Universal typically includes 9 to 12 full-time warehousemen. Universal also selects warehousemen from a list of casual employees, presumably on an as-needed basis. The unit at Erie generally consists of five to seven full-time, one part-time, and one seasonal warehousemen.

In 1976, four employers, including Universal and Erie, negotiated jointly with the Union. The Union and each of the Charging Parties entered into separate collective-bargaining agreements, which were effective from August 1, 1976, to July 31, 1979. The contract provisions relevant to this case were identical. Article VI provided in part:

> The Employer may hire employees to work as a seasonal, casual or part-time worker, provided in no case shall such an employee be hired for the purpose of displacing a regular full-time employee or for reducing the normal complement of regular, full-time employees. Such an employee shall not become a seniority employee under this Agreement where it has been agreed by the Employer and the Union that such employee was hired for seasonal, casual or part-time work. The work [sic] "seasonal", as used herein, is meant to cover situations such as the "Christmas period" and other seasonal occasions where the Employer has a temporary high level of business operations. The words "casual or part-time", as used herein, are meant to cover situations such as replacements for absenteeism, for vacations and illnesses, and for an unbalanced work load during a portion of the work week. *Such seasonal, casual or part-time employees shall not be entitled to any fringe benefits under this Agreement or contributions with respect thereto, except as required by law.* [Emphasis supplied.]

Article XV provided for contributions in specified amounts to the New York State Teamsters Council Welfare Trust Fund on behalf of "regular" employees and "all casual employees." Article XVI provided for each Charging Party to make contributions in specified amounts to the New York State Teamsters Council Pension and Retirement Fund on behalf of "any and all of its employees covered

[1] The Charging Parties have requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

[2] The complaint also alleges that Respondents' conduct violated Sec. 8(b)(1)(A) of the Act. We hereby dismiss that allegation inasmuch as we can discern no basis for finding such a violation under the facts presented in this case.

[3] The appropriate bargaining unit at Universal consists of:

All truck drivers and warehousemen employed by Universal at its Hertel Avenue, Buffalo, New York facility, excluding guards and supervisors as defined in the Act.

The appropriate bargaining unit at Erie consists of:

All truck drivers and warehousemen employed by Erie at its Empire Drive, West Seneca, New York facility, excluding guards and supervisors as defined in the Act.

by this Agreement . . . ." That article further stated:

> The Employer and the Union hereby agree simultaneously herewith to execute a stipulation submitted by the pension trustees setting forth General Freight Agreement and certifying that the Employer is entered into a written agreement containing such provisions. The Fund Trustees may reserve the right to refuse to accept contributions from employers who fail to execute such stipulation.

The pension fund referred to in article XVI is a "Taft-Hartley trust"[4] established in 1954 by an Agreement and Declaration of Trust. The collective-bargaining agreements of 14 Teamsters local unions, including Respondent Local No. 449, provide for employer contributions to, and employee benefits from, this pension fund. The fund is administered by a board of trustees consisting of four members selected by the participating employers, and four by the participating local unions. The union-designated trustees are business agents of participating local unions. At all times material to the instant case, no official of either the Union or the Charging Parties served as a trustee.[5]

As required by article XVI, the Union, Universal, and Erie each executed pension fund participation agreements called "stipulations." These are form contracts containing blank spaces in which the parties insert the effective and expiration dates, and the rates of contributions as negotiated by the employers and the local unions. The first paragraph of the stipulations stated that "[t]he employer agrees to contribute for any and all of his regular full-time and any and all other employees covered by this Agreement to the New York State Teamsters Conference Pension & Retirement Fund . . . ." The stipulations essentially set forth various financial and other obligations which employers assumed with respect to the pension fund. In addition, two paragraphs provided for extending coverage to nonunit union employees, and to nonunion employees.[6] The last paragraph, paragraph 18, stated in part:

> This agreement shall continue in full force and effect for the same term as the Labor Agreement and shall continue in force and effect for the life of all future agreements replacing the present Labor Agreement with the exception that any and all conditions or contributions over and above those specified herein shall be applicable.

The stipulations also contained a clause which certified that "the provisions, terms and wording in this Stipulation is identical to that in Collective Bargaining Agreement." All parties also executed welfare fund stipulations with identical provisions.

During the term of the 1976–79 collective-bargaining agreement, Universal sometimes made contributions to the welfare fund for casual employees, but did not do so on a regular basis. Erie did contribute to the welfare fund on behalf of casual employees. With respect to payments to the pension fund, Universal made contributions on behalf of full-time employees only, although occasionally it made payments for a casual employee due to a clerical error. Erie made pension fund contributions on behalf of full-time employees only.

In October 1978, in *William H. Mosley, Sr., et al.* v. *Erie Liquor Co., Inc.*, the trustees of the pension fund and the welfare fund brought an action against Erie in New York State Supreme Court, County of Oneida. The trustees alleged that Erie was not paying the full amounts that it owed to the funds. They contended that Erie was required to make payments to the pension fund on behalf of all employees, presumably including seasonal, casual, and part-time employees covered by the collective-bargaining agreement. In making this allegation, they relied on the first paragraph of the stipulation which provided, as noted previously, that "[t]he employer agrees to contribute for any and all of his regular full-time and any and all other employees covered by this Agreement." Erie denied in its answer that it was required to make contributions

[4] This is the popular term for a trust established in accordance with Sec. 302(c)(5) of the Act.

[5] However, Ervin Walker, the Union's business agent, was a welfare fund trustee.

[6] Pars. 7 and 8 provide as follows:

7. The Pension Fund shall be open to participation by any group of members belonging to a participating Local Union and the employer may contribute to the New York State Teamsters Conference Pension & Retirement Fund for employees working outside the jurisdiction of the Collective Bargaining Agreement in the amounts indicated above. However, if these employees are included, the employer agrees to make contributions on *all employees* in this category subject to the same conditions and on the same basis as is provided in this stipulation, and the employer also agrees to continue to make contributions on *all of these employees* for as long as there shall be a Collective Bargaining Agreement or Agreements between the employer and the Union, subject to any and all rules and regulations or decisions covering this group that are issued by the Board of Trustees.

8. The employer agrees that should he not make contributions on 100% of all his non-union employees as required herein, the New York State Teamsters Conference Pension & Retirement Fund will not pay nor be liable or obligated to pay any Pension & Retirement or any other benefits to all his non-union employees whatsoever, whether or not contributions were made on such individuals, in which event the employer shall pay to any or all such non-union employees any and all Pension & Retirement or other benefits that such employee or employees may have been entitled to or are later entitled to until such time that the Pension Board of Trustees of the New York State Teamsters Conference Pension & Retirement Fund once again extends coverage to this group and only under terms decided solely by the Board of Trustees of the New York State Teamsters Conference Pension & Retirement Fund.

for any employees except regular and steady employees. In a bill of particulars, the trustees maintained that the parties intended to incorporate the stipulation into the collective-bargaining agreement, and that, consequently, Erie was liable for contributions on behalf of all employees covered by the collective-bargaining agreement. The trustees did not pursue this litigation.

In *S. M. Flickinger Co., Inc.* v. *Phillip Ross, Industrial Commissioner* (Docket No. PR-20-79 and PR-21-79, May 15, 1980), the New York State Department of Labor, Industrial Board of Appeals, interpreted what was apparently the same stipulation at issue in the instant case. In that case, the Board revoked an order of the New York State industrial commissioner. The commissioner had ordered Flickinger to make pension fund payments on behalf of certain unspecified employees (presumably casual employees) represented by unspecified Teamsters locals. The stipulation provided, as does the one in the instant case, that the employer make pension fund payments "for any and all of his regular full-time and any and all other employees covered by this agreement." The Board rejected the commissioner's contention that the term "this agreement" meant the collective-bargaining agreement, which contained references to regular full-time, part-time, and casual employees. The Board found that the phrase "covered by this agreement" referred to employees covered by the stipulation, defined in the stipulation itself as union employees working outside of the jurisdiction of the collective-bargaining agreement, and also nonunion employees. The Board, therefore, concluded that Flickinger had complied with its obligation by making pension fund payments on behalf of its regular full-time employees.[7]

In 1979, Universal, Erie, and another employer began joint negotiations with the Union for successor collective-bargaining agreements. The provisions of the 1976-79 contract, noted previously, were incorporated verbatim into the new contract, including the provision which required that the parties simultaneously execute stipulations submitted to them by the trustees of the pension fund. The only discussion about pensions regarded the amounts of the contributions to the fund and the effective dates of the contributions. Contributions were increased for each succeeding year of the 3-year contracts. No one representing the pension fund trustees was present during the negotiations, nor were the trustees consulted regarding the negotiations. Ervin Walker, the Union's business agent and a welfare fund trustee, was the Union's chief negotiator. Walker did not submit any stipulation to the employers, nor did he inform them of any proposed modifications in the existing stipulations. The collective-bargaining agreements were signed on or about September 6, 1979. Erie and Universal continued to tender pension fund contributions for their full-time employees.

By letter dated October 15, 1979, the Union requested Erie to sign new stipulations for both the pension fund and the welfare fund.[8] These new stipulations were enclosed with the Union's letter. The first paragraph of the stipulations had been completely rewritten, and stated in pertinent part:

> The undersigned, Employer and Union, understand and agree that pension [or health and hospital] contributions shall be made as set forth herein, on all employees doing bargaining unit work, and on any and all other employees doing the same work as bargaining unit employees, whether or not they are included in the bargaining unit, whether or not they are union members, *whether full-time, part-time, casual or seasonal.* No agreement between the employer and the Union shall alter this rule or any other rule or provision of this Stipulation. That in the event there is any agreement between Employer and Union that is contrary to or inconsistent with the terms of this Stipulation or the rules of the Pension [or health and hospital] Fund, such inconsistent provisions shall be null and void and superseded by the terms of this Stipulation and/or the rules of the Fund.

The letter was signed by Union Business Agent Walker.

Erie then wrote to the trustees of the pension fund, and maintained that it was not required to make pension fund payments on behalf of seasonal, casual, or part-time employees. There was some additional correspondence between Erie and the trustees in November and December. The trustees continued to contend that Erie was liable for these payments, and stated that they would not continue to accept contributions tendered by Erie unless Erie also included the contributions in dispute.[9] By letter dated February 8, 1980, the Union again demanded that Erie execute the pension fund stipula-

[7] The same stipulation was apparently at issue in another case. In *Boulter Carting Co., Inc.* v. *R. F. DePerno* (Docket No. 647/1979), the New York State Supreme Court, County of Monroe, found that several employers were obligated to make pension fund contributions on behalf of their employees, including casual employees, who were members of a Teamsters local.

[8] Erie and the Union soon negotiated different health and welfare coverage. Universal and the Union presumably did likewise.

[9] Both the 1976-79 and the 1979-82 collective-bargaining agreements provided, as indicated previously, that "[t]he [Pension] Fund Trustees may reserve the right to refuse to accept contributions from Employers who fail to execute [a] stipulation."

tion. This letter was also signed by Union Business Agent Walker. The trustees began refusing to accept Erie's contributions at the end of February. By letter dated July 11, 1980, Walker demanded for the third time that Erie execute the stipulation. Finally, by letter dated May 13, 1981, the trustees notified Erie that they were in the process of assessing Erie's withdrawal liability under the Multi-Employer Pension Plan Amendments Act of 1980.

The pension fund trustees and the Union made similar demands upon Universal. By letters dated February 8 and July 11, 1980, Walker demanded that Universal execute the new stipulation. The fund informed Universal's employees by letters dated August 11, 1980, that Universal had refused to sign the stipulation, and that consequently the employees ceased to be participants in the pension fund. Shortly afterwards, the fund refused to accept contributions because Universal did not sign a stipulation. The record indicates that Universal subsequently obtained a temporary restraining order in the United States District Court for the Western District of New York, which enjoined the fund from refusing to accept contributions.

The Administrative Law Judge's Decision

The Administrative Law Judge recommended that the complaint be dismissed. He found that Respondents had not committed any unfair labor practices, and also that the pension fund trustees were not agents of the Union.

The Administrative Law Judge began his analysis by examining the first paragraph of the "old" stipulations, which provided that contributions were to be made on behalf of "any and all . . . regular full-time and any and all other employees covered by this Agreement . . . ." He found that the term "this Agreement" referred to the stipulations themselves rather than to the collective-bargaining agreements,[10] but reasoned that since the stipulations did not define the extent of coverage, beyond regular full-time employees, such coverage was determined as provided by the collective-bargaining agreements, subject to certain conditions set forth in the stipulation.[11]

Examining the collective-bargaining agreements, the Administrative Law Judge concluded that they included seasonal, casual, and part-time employees within the pension plan's coverage. He reasoned that article 4.02 (art. VI in the 1976–79 collective-bargaining agreements), which provided that "seasonal, casual or part-time employees shall not be entitled to any fringe benefits under this Agreement, or contributions with respect thereto," must be interpreted in light of the provisions in the contract dealing specifically with fringe benefits. The 1976–79 contracts, he noted, contained a formula for computing the amount owing to the welfare plan on behalf of casual employees, and that this provision was continued in effect for a 90-day period under the 1979 contracts. The Administrative Law Judge also stated that both the 1976–79 and the 1979–82 contracts provided for pension fund contributions on behalf of "any and all employees." He found that the parties would have limited this coverage to regular full-time employees if that had been their intention, noting that the provisions of the contract relating to vacations and holidays made specific reference to "steady employees," "regular employees," and "casual employees." The Administrative Law Judge concluded that the contract provisions dealing particularly with pensions and welfare contributions, like those which dealt with vacations and holidays, superseded the general and undefined reference to "fringe benefits." Consequently, he found that all unit employees, including casual employees, were covered by the pension plan.[12]

The Administrative Law Judge stated that evidence concerning the 1979 contract negotiations reinforced his finding. He reasoned that the Charging Parties were fully aware of the trustees' position, and yet nevertheless agreed to reexecute stipulations submitted by the pension fund trustees. The Administrative Law Judge stated that Charging Parties had thereby "invit[ed]" the fund to submit a stipulation which would clarify its position with respect to contributions payable on behalf of casual employees. He found that the trustees properly interpreted the contracts, and therefore had not sought to modify or alter them.

[10] The Administrative Law Judge acknowledged that, in par. 18 of the stipulation, the term "this Agreement" was used in conjunction with a reference to the "Labor Agreement."

[11] See fn. 6, *supra.*

[12] The Administrative Law Judge concluded that the prior litigation concerning the interpretation of the stipulation did not militate in favor of a contrary finding. He found that *Mosley* v. *Erie Liquor Co., Inc.*, the action by the trustees of the pension fund and the health and welfare fund against Erie, was significant for two reasons. First, it placed the trustees and Erie on notice of their respective, and conflicting, positions regarding the extent of Erie's obligations to make contributions on behalf of its employees. The Administrative Law Judge also noted that this notice was imputable to Universal because the attorney who represented both Erie and Universal in the 1979 contract negotiations was familiar with the action. Second, the Administrative Law Judge concluded that the lawsuit precluded any finding that there was an established or past practice regarding pension fund contributions. The Administrative Law Judge, in effect, concluded that the other two lawsuits had little or no probative value with respect to any of the issues in the instant case. He stated that neither proceeding involved contracts between the Charging Parties and the Union, and that the contract at issue in those cases had not been admitted into evidence in the instant case. He also found that each tribunal reached different conclusions regarding the first paragraph of the stipulations, and that none of the proceedings addressed the question of whether the pension fund could lawfully change the language of its stipulations.

Even if the Charging Parties' interpretation of the contracts were correct, the Administrative Law Judge stated that he would still dismiss the allegations in the complaint regarding the trustees. He found that the trustees were not agents of the Union. He noted that the union-designated trustees have two separate and significantly different obligations. One obligation entails their responsibilities as union officials to their own particular local unions. The other is their fiduciary responsibility to all of the beneficiaries of the pension fund.[13] The Administrative Law Judge concluded that there was no basis for finding that the union-designated trustees, when acting in their capacity as trustees, were also acting on behalf of their respective unions, or, presumably, on behalf of Respondent Union. For legal support, the Administrative Law Judge relied on *N.L.R.B.* v. *Amax Coal Co., a Division of Amax, Inc.*, 453 U.S. 337 (1981). In *Amax*, the Court held that employer-designated trustees of a Taft-Hartley trust are not representatives of the employer "for the purposes of collective bargaining or the adjustment of grievances" within the meaning of Section 8(b)(1)(B) of the Act. The Court also stated, in dicta:

> If the administration of §302(c)(5) trust funds [i.e., Taft-Hartley trusts] were "collective bargaining" within the meaning of federal labor law . . . the NLRB would have to review the discretionary actions of the trustees according to the statutory duty of good-faith bargaining. 29 U.S.C. §§ 158 (a)(5), (b)(3), (d). The Board would thereby be thrust "into a new area of regulation which Congress [has] not committed to it . . . ." [453 U.S. at 337, fn. 21.]

The Administrative Law Judge rejected the Charging Parties' contention that the trustees acted *ultra vires* in not accepting the contributions when they were tendered. He found that they had implied authority under the Agreement and Declaration of Trust to refuse to accept contributions which did not accord with their funding policy and method. He also stated that, even assuming *arguendo* that the trustees acted in excess of their authority, it does not follow that they acted as agents of the Union. He reiterated that there was no evidence indicating that the trustees acted in the interest of the Union rather than on behalf of the pension fund's beneficiaries.

Finally, the Administrative Law Judge found that, assuming *arguendo* that the collective-bargaining agreements excluded seasonal, casual, and part-time employees from coverage under the pension plan, the Union had not committed any unfair labor practice. He noted that the only action taken by the Union consisted of sending several letters to each of the Charging Parties in which Union Business Agent Walker requested them to sign the new stipulations. The Administrative Law Judge reasoned that it is not an unfair labor practice for a union to request modification of a collective-bargaining agreement. He found that the Union's request was not accompanied by any threats of what might happen if the Charging Parties did not execute new stipulations. The Administrative Law Judge concluded that the Union was simply fulfilling its duties as the employees' representative.

Analysis

We disagree with the Administrative Law Judge's interpretation of the collective-bargaining agreements and the stipulations.[14] We also disagree with his finding that the trustees did not act as agents of the Union. We find that the Union, and the trustees acting as its agent, did violate Section 8(b)(3) as alleged.

We first find that the "new" stipulations were inconsistent with provisions in the 1979–82 collective-bargaining agreements. Additionally, we find that the insistence by the trustees and the Union that the Charging Parties make contributions for seasonal, casual, and part-time employees pursuant to the "new" stipulations, in conjunction with the trustees' refusal to accept any moneys tendered by the Charging Parties, constituted an unlawful unilateral attempt to alter or modify the 1979–82 collective-bargaining agreements.

A careful examination of the "old" stipulations and the 1976–79 collective-bargaining agreement reveals that the Charging Parties had no obligation to make pension fund contributions for casual, seasonal, or part-time employees. Those stipulations provided that each of the Charging Parties would contribute to the pension fund on behalf of "any and all of his regular full-time and any and all other employees covered by this Agreement." We find that the term "this Agreement" refers to the stipulations themselves rather than to the collective-bargaining agreements. Another tribunal which

[13] As mentioned previously, the fund includes beneficiaries represented by 14 Teamsters local unions in a multitude of bargaining units. The Union in the instant case represents only a fraction of those beneficiaries.

[14] The Board may resolve questions of contract interpretation in adjudicating unfair labor practice allegations. *N.L.R.B.* v. *C & C Plywood Corporation*, 385 U.S. 421 (1967). Chairman Van de Water, in accord with his concurring opinion in *Capitol City Lumber Company*, 263 NLRB 784 (1982), notes that the dispute here is simply about the interpretation and application of collective-bargaining agreements and related stipulations and, while he is participating in this Decision, believes contractual disputes can more properly be settled in the appropriate state and Federal courts or by arbitration. Given the Board's existing backlog, the processes of the Agency can be better utilized.

has interpreted this term, the Industrial Board of Appeals, New York State Department of Labor, has reached the same conclusion. And the Administrative Law Judge stated in the only finding of his with which we agree, that the term "this Agreement" refers to the stipulation. Universal and Erie were thus obligated to contribute for their full-time employees, and for any and all other employees covered by the stipulation. These latter employees were described in paragraphs 7 and 8 of the stipulations: they were nonunit union employees, and nonunion employees.[15] The pension provisions in the 1976–79 collective-bargaining agreements are harmonious with the stipulations. In those contracts, each Charging Party committed itself, by language virtually identical to that in the stipulations, to make pension fund payments for "any and all of its employees covered by this Agreement." The certification appearing on the stipulations stated that "the provisions, terms and wording in this Stipulation is identical to that in Collective Bargaining Agreement." Therefore, the term "any and all . . . employees covered by this Agreement" must have the same meaning in the collective-bargaining agreements as it has in the stipulations.[16]

We think that other provisions of the collective-bargaining agreements support our conclusion that the Charging Parties were obligated to contribute on behalf of full-time, regular employees only. Article VI provided that "[s]easonal, casual, or part-time employees shall not be entitled to any fringe benefits . . . or contributions with respect thereto." When the parties to the collective-bargaining agreements created exceptions to this provision, they did so very deliberately. For example, article XV required welfare fund contributions on behalf of "all casual employees," and article XIV, dealing with holidays, similarly mentioned "casual employees." There was no such specific reference to either seasonal, casual, or part-time employees in article XVI, the pension provision. We therefore conclude that the parties did not intend to modify the straightforward statement in article VI that seasonal, casual, or part-time employees are not entitled to receive fringe benefits, or to have pension contributions paid on their behalf.

Further, the past practice during the duration of the 1976–79 collective-bargaining agreements was that both of the Charging Parties made pension fund contributions on behalf of full-time employees only (although, as noted previously, Universal occasionally paid on behalf of casual employees due to clerical errors). We find that past practice supports the Charging Parties' position that the 1976–79 collective-bargaining agreements did not obligate them to make contributions for seasonal, casual, or part-time employees.[17]

All of the relevant language in the 1976–79 contract was incorporated into the 1979–82 contract, without discussion. The parties thereby indicated their belief that all of the language was sufficiently precise, and that pension fund contributions were to be made only on behalf of full-time employees. The Union's chief negotiator, Business Agent Ervin Walker, was surely in a position to know that different stipulations would soon be submitted by the health and welfare fund and the pension fund. Walker was a trustee of the welfare fund, which submitted a stipulation identical to that submitted by the pension fund. Nevertheless, Walker did not mention the modified stipulations during contract negotiations. The Charging Parties were thus led to believe that any "successor" stipulation would be consistent with the terms of the collective-bargaining agreement.

Consequently, we disagree with the Administrative Law Judge's finding that, when the parties consented "to execute a stipulation submitted by the Pension Trustees," they were "inviting" the trustees to amend the stipulations. We were recently confronted with this issue in *Warehousemen's Local 334, Teamsters (The Crescent, Division of The Halle Brothers Company)*, 253 NLRB 1090 (1981), enforcement denied 670 F.2d 855 (9th Cir. 1982). In that case, the trustees of a Taft-Hartley trust established a vision care plan for employees, even though the employers had refused to agree to such a plan during contract negotiations with the Union. In concluding that this constituted a violation of Section 8(b)(3), we rejected the contention that the employers had consented to abide by the trustees' discretionary creation of a vision care plan because they executed declarations of trust in which they agreed to be bound by the acts of the trustees. We reasoned:

> On no occasion have the Employers executed any Trust document delegating unlimited agency to the Trust, or empowering the Trust to implement benefit plans other than those specified in their collective-bargaining agree-

[15] The text of these paragraphs is fully set forth at fn. 6, *supra*.

[16] Further, in their 1978 action against Erie, the trustees relied on the certification clause in maintaining that the language in the collective-bargaining agreement mirrored the language in the stipulation.

[17] Contrary to the Administrative Law Judge's finding, the trustees' initiation of the action in *Mosley* v. *Erie Liquor Co., Inc.*, does not preclude a finding that there was no established past practice regarding the contributions in dispute. In its answer, Erie denied that it was liable for the additional contributions sought by the fund's trustees. Erie contended that it was responsible for contributions for regular and steady employees only. Finally, the trustees did not pursue this litigation, and thus they abandoned their claim to the moneys they sought.

> ments, nor have they otherwise agreed to be bound by any Trust provisions beyond their collective-bargaining agreement commitments. Therefore, while those agreements clearly state that the Employers agree to be bound by the decision of the Trustees, the extent of any discretionary authority thereby granted is equally clear—it extends only to decisions related to the benefit plans specifically agreed upon. [253 NLRB at 1091.]

The facts here are similar. When the parties carried over, verbatim and without discussion, the pension provisions from the 1976–79 contracts, they did not give the trustees a blank check. As *Halle Brothers* indicates, trustees' authority in such a situation must be exercised within the parameters of the collective-bargaining agreement. In the instant case, as explained above, the parties contemplated that stipulations consistent with the collective-bargaining agreement would be resubmitted to them. And, the reason that stipulations had to be reexecuted is obvious. The parties had negotiated new, higher rates of contributions, and these new rates had to be inserted into the appropriate spaces in the stipulations. Further, had the parties to the 1979–82 collective-bargaining agreements intended to extend pension fund coverage to seasonal, casual, and part-time employees, they would have directly and specifically said so in article 25, the pension provision, instead of carrying over the language in that article from article XVI of the 1976–79 contracts.

It is clear that the pension fund trustees and the Union attempted to impose their interpretation of the collective-bargaining agreements upon the Charging Parties. The trustees sent several letters to each of the Charging Parties urging that they execute the stipulations. Eventually, the trustees threatened to terminate the Charging Parties' participation in the fund if they did not remit contributions for their seasonal, casual, and part-time employees as well as for their full-time employees. The trustees ultimately made good on this threat. The Union concurred in the trustees' efforts. Ervin Walker, the Union's business agent and also a welfare fund trustee, sent Erie a letter in October 1979, with the new, identical welfare fund and pension fund stipulations enclosed. In the letter, Walker requested Erie to execute the stipulations. In light of the common interests of both the welfare fund and the pension fund, and the identical stipulations, we are compelled to conclude that Walker was acting in concert with the pension fund trustees. Walker subsquently sent additional letters to Erie and Universal asking them to sign the pension fund stipulations. He did not protest when the trustees threatened to terminate pension benefits to all of the Charging Parties' employees, whom he represented. Walker apparently did not even object when those benefits were actually terminated. The Union's campaign was thus intertwined with and equally as reprehensive as that of the trustees. Together, they attempted to coerce each of the Charging Parties into modifying its collective-bargaining agreement.

Having found that the Union and the pension fund trustees attempted to modify or alter the 1979–82 collective-bargaining agreements, we now turn to the issue of whether the trustees acted as agents of the Union.

Not infrequently, we have found that trustees of a Taft-Hartley trust may be agents of the parties to a collective-bargaining agreement.[18] For example, in *Local 80, Sheet Metal Workers International Association, AFL–CIO (Turner-Brooks, Inc.)*, 161 NLRB 229 (1966), we found that trustees whose actions were circumscribed by the provisions of a collective-bargaining agreement were agents of both the union and the employer. Pursuant to those provisions, the trustees could not and did not accept payments tendered by the employer. We concluded that the trustees thereby acted as agents of the union, and found that they violated Section 8(b)(3).[19]

As in *Turner-Brooks*, the trustees were acting pursuant to authority granted by the collective-bargaining agreements. Section 25.02 of the 1979–82 contracts provides that "[t]he Fund Trustees may reserve the right to refuse to accept contributions from Employers who fail to execute [a] stipulation." It is quite clear that the trustees were using this authority on behalf of the Union. The Union was willing to sacrifice the pension benefits of all employees. It did not protest to the trustees when they absolutely refused to accept contributions for full-time employees. To the contrary, the Union fully supported the trustees' erroneous interpretation of the collective-bargaining agreements, and

[18] See, e.g., *Halle Brothers Company, supra* (union's trustees "were speaking with a union voice" when they attempted to institute a vision plan that was at odds with the collective-bargaining agreement); *Jacobs Transfer, Inc.*, 227 NLRB 1231 (1977) (trustees were agents for purposes of accepting contributions that were made in compliance with backpay awards); *L & M Carpet Contractors, Inc.*, 218 NLRB 802 (1975) (union trustee who requested audit of employer's records was agent of union).

[19] In *Turner-Brooks*, the union unlawfully insisted, as a condition precedent to entering into a collective-bargaining contract with Turner-Brooks, that the contract include provisions for an industry promotion fund. Turner-Brooks signed the contract, but indicated that its agreement to the promotion fund provisions was under protest. Turner-Brooks attempted to make contributions to various employee benefit funds established pursuant to the collective-bargaining agreement, but not to the industry promotion fund. The trust funds would not accept these contributions because two sections of the collective-bargaining agreement in effect prohibited them from accepting an amount which was less than the entire amount payable to all of the funds.

joined in an effort to collect the additional contributions to which the trustees were not entitled. Both the trustees and the Union were thus pursuing the Union's own interest, which was to include seasonal, casual, and part-time employees within the pension plan. We therefore conclude that the trustees were acting as agents of the Union.

We find that the Administrative Law Judge's reliance on dicta in *N.L.R.B.* v. *Amax Coal Company, supra*, is misplaced. The Supreme Court in *Amax* specifically noted that trustees "*can neither require employer contributions not required by the original collectively bargained contract*, nor compromise the claims of the union or the employer with regard to the latter's contributions." (Emphasis supplied.)[20] Our finding is, therefore, entirely consistent with the *Amax* decision. Furthermore, contrary to the Administrative Law Judge's implication, no "discretionary actions" of the trustees are at issue here. The trustees were instead acting in the Union's interest. As we explained in *Halle Brothers*, noted previously, the Charging Parties cannot be "bound by any Trust provisions beyond their collective-bargaining agreement commitments." (253 NLRB at 1091.) In the instant case, we seek only to preserve the integrity of the collective-bargaining process and the fruits of that process: the 1979–82 collective-bargaining agreements. We will not allow unilateral changes to be made in the terms of collective-bargaining agreements through this type of subterfuge. As we stated in *Halle Brothers, supra* at 1091–92:

> If such unilateral changes can be made after specific rejection in collective bargaining, then bargaining is undermined. Taken to its logical conclusion, even agreed-upon benefits have no certainty of constancy during the contract term if such benefits can be modified by means of the ploy used here.

CONCLUSIONS OF LAW

1. Universal Liquor Corp. and Erie Liquor Co., Inc., are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent Teamsters Local Union No. 449 is a labor organization within the meaning of Section 2(5) of the Act.

3. All truck drivers and warehousemen employed by Universal at its Hertel Avenue, Buffalo, New York facility, excluding guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of the Act.

4. All truck drivers and warehousemen employed by Erie at its Empire Drive, West Seneca, New York facility, excluding guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of the Act.

5. Respondent Teamsters Local Union No. 449, since on or about August 1, 1976, and at all times material herein, has been and is the exclusive representative of all the employees in the aforesaid appropriate units for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other conditions of employment.

6. By demanding that Universal Liquor Corp. and Erie Liquor Co., Inc., execute the stipulations presented to them after the 1979–82 collective-bargaining agreements were negotiated and signed, and by refusing through its agents, the pension fund trustees, to accept payments tendered by Universal Liquor Corp. and Erie Liquor Co., Inc., Respondent Teamsters Local No. 449 has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(3).

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent Teamsters Local Union No. 449 and its agents, the trustees of the pension fund, have engaged in certain unfair labor practices, we shall order them to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

We shall order Respondent Teamsters Local Union No. 449 and its agents, the trustees of the pension fund, to cease and desist from demanding that Universal Liquor Corp. and Erie Liquor Co., Inc., execute the stipulations presented to them after the 1979–82 collective-bargaining agreements were negotiated and signed, or any other stipulations that are inconsistent with the terms and provisions of those collective-bargaining agreements. We shall also order Respondent Teamsters Local Union No. 449 and its agents, the trustees of the pension fund, to cease and desist from refusing to accept contributions tendered by Universal Liquor Corp. and Erie Liquor Co., Inc., on behalf of their full-time employees, in the amounts set forth in their 1979–82 collective-bargaining agreements. Affirmatively, we shall order the trustees to accept

[20] 453 U.S. at 336.

In agreeing with his colleagues in the instant case, Member Hunter finds it unnecessary to rely on the Board's decisions prior to the Supreme Court's opinion in *Amax Coal, supra*. Member Hunter agrees that in the circumstances of this case, where the trustees in fact acted as agents for collective-bargaining purposes because they exercised authority given them by the collective-bargaining agreement, there has been a violation of Sec. 8(b)(3) of the Act.

the pension fund contributions remitted by Universal Liquor Corp. and Erie Liquor Co., Inc., on behalf of their full-time employees, pursuant to their obligations set forth in the collective-bargaining agreements.[21] In the event that the pension fund has not paid benefits to any of the units' employees, which benefits they would have received in the absence of the unfair labor practices found herein, we shall order Respondent Teamsters Local Union No. 449 to reimburse those employees, with interest, for any such loss of benefits.[22]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board herey orders that:

A. Respondent Truck Drivers Local Union No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Buffalo, New York, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Refusing to bargain with Universal Liquor Corp. and Erie Liquor Co., Inc., as the representative of their employees in the appropriate units described below, by demanding that they execute the pension fund stipulations presented to them after the 1979–82 collective-bargaining agreements were negotiated and signed, or any other stipulations that are inconsistent with the terms and provisions of those collective-bargaining agreements. The appropriate collective-bargaining unit at Universal Liquor Corp. is:

> All truck drivers and warehousemen employed by Universal at its Hertel Avenue, Buffalo, New York facility, excluding guards and supervisors as defined in the Act.

The appropriate collective-bargaining unit at Erie Liquor Co., Inc., is:

> All truck drivers and warehousemen employed by Erie at its Empire Drive, West Seneca, New York facility, excluding guards and supervisors as defined in the Act.

(b) Refusing to bargain with Universal Liquor Corp. and Erie Liquor Co., Inc., by refusing through their agents, the pension fund trustees, to accept pension fund contributions tendered to them on behalf of full-time employees, in the amounts set forth in the 1979–82 collective-bargaining agreements.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) In the event that the pension fund has not paid benefits to any of the units' employees, which benefits they would have received in the absence of the unfair labor practices found herein, reimburse those employees, with interest, for any such loss of benefits, as set forth in the section of the Decision entitled "The Remedy."

(b) Post at its office and meeting halls copies of the attached notice marked "Appendix A."[23] Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by an authorized representative of Respondent Teamsters Local Union No. 449, shall be posted by Teamsters Local Union No. 449, immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Teamsters Local Union No. 449 to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Sign and return to said Regional Director sufficient copies of the attached notice marked "Appendix A" for posting by Universal Liquor Corp. and Erie Liquor Co., Inc., if they are willing, in conspicuous places, including all places where notices to employees are customarily posted.

(d) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

B. Respondent Al Sgaglione, Executive Director of the New York State Teamsters Conference Pension & Retirement Fund, Irving Wisch, Kepler Vincent, T. Edward Nolan, Rocco F. DePerno,

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[21] Because the provisions of employee pension fund agreements are variable and complex, the Board does not provide for interest at a fixed rate on fund payments due as part of a "make-whole" remedy. We therefore leave to further proceedings the question of how much interest Respondent Teamsters Local Union No. 449 must pay into the pension fund in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference to provisions in the documents to evidence of any loss directly attributable to the unlawful action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. See *Merryweather Optical Company*, 240 NLRB 1213, 1216 at fn. 7 (1979).

[22] Any and all issues regarding the cancellation of coverage are reserved to the compliance stage. Any interest which is payable shall be computed in the manner and amount prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Member Jenkins would require any interest payable to employees to be computed in the manner set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980). In addition, Member Jenkins would run the reimbursement order against the trustees individually as agents of Respondent Union and would further hold the trustees personally but secondarily liable for any monetary reimbursement due.

[23] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Victor Mousseau, Paul E. Bush, Jack Canzoneri, Trustees of the New York State Teamsters Conference Pension & Retirement Fund, Utica, New York, their agents and representatives, shall:

1. Cease and desist from:

(a) Demanding that Universal Liquor Corp. and Erie Liquor Co., Inc., execute the pension fund stipulations presented to them after the 1979–82 collective-bargaining agreements were negotiated and signed, or any other stipulations that are inconsistent with the terms and provisions of those collective-bargaining agreements.

(b) Refusing to accept the contributions on behalf of full-time employees tendered to them as trustees of the pension fund, in the amounts set forth in the 1979–82 collective-bargaining agreements.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Accept the contributions on behalf of full-time employees tendered to them as trustees of the pension fund, in the amounts set forth in the 1979–82 collective-bargaining agreements.

(b) Post at their business offices in Utica, New York, copies of the attached notice marked "Appendix B."[24] Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by an authorized representative of Respondent pension fund, shall be posted by the pension fund, immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to the public are customarily posted. Reasonable steps shall be taken to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Sign and return to said Regional Director sufficient copies of the attached notice marked "Appendix B" for posting by Universal Liquor Corp. and Erie Liquor Co., Inc., if they are willing, in conspicuous places, including all places where notices to employees are customarily posted.

(d) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[24] See fn. 23, *supra.*

APPENDIX A

NOTICE TO EMPLOYEES AND MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT refuse to bargain with Universal Liquor Corp. and Erie Liquor Co., Inc., as the representative of their employees in the appropriate units described below, by demanding that they execute the pension fund stipulations presented to them after the 1979–82 collective-bargaining agreements were negotiated and signed, or any other stipulations that are inconsistent with the terms and provisions of those collective-bargaining agreements. The appropriate collective-bargaining unit at Universal Liquor Corp. is:

> All truck drivers and warehousemen employed by Universal at its Hertel Avenue, Buffalo, New York facility, excluding guards and supervisors as defined in the Act.

The appropriate collective-bargaining unit at Erie Liquor Co., Inc., is:

> All truck drivers and warehousemen employed by Erie at its Empire Drive, West Seneca, New York facility, excluding guards and supervisors as defined in the Act.

WE WILL NOT refuse to bargain with Universal Liquor Corp. and Erie Liquor Co., Inc., by refusing through our agents, the pension fund trustees, to accept pension fund contributions tendered on behalf of full-time employees, in the amounts set forth in the 1979–82 collective-bargaining agreements.

WE WILL, in the event that the pension fund has not paid benefits to any of the units' employees, which benefits they would have received in the absence of our unfair labor practices, reimburse those employees, with interest, for any such loss of benefits.

TRUCK DRIVERS LOCAL UNION NO. 449, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA

APPENDIX B

NOTICE
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

TO ALL EMPLOYEES OF UNIVERSAL LIQUOR CORP. AND ERIE LIQUOR CO., INC.

WE WILL NOT demand that Universal Liquor Corp. and Erie Liquor Co., Inc., execute the pension fund stipulations presented to them after the 1979–82 collective-bargaining agreements were negotiated and signed, or any other stipulations that are inconsistent with the terms and provisions of those collective-bargaining agreements.

WE WILL NOT refuse to accept the contributions on behalf of full-time employees tendered to us as trustees of the pension fund, in the amount set forth in the 1979–82 collective-bargaining agreements.

WE WILL accept the contributions on behalf of full-time employees tendered to us as trustees of the pension fund, in the amounts set forth in the 1979–82 collective-bargaining agreements.

AL SGAGLIONE, EXECUTIVE ADMINISTRATOR OF THE NEW YORK STATE TEAMSTERS CONFERENCE PENSION & RETIREMENT FUND, IRVING WISCH, KEPLER VINCENT, T. EDWARD NOLAN, ROCCO F. DEPERNO, VICTOR MOUSSEAU, PAUL E. BUSH, JACK CANZONERI, TRUSTEES OF THE NEW YORK STATE TEAMSTERS CONFERENCE PENSION & RETIREMENT FUND

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge: These consolidated cases were heard at Buffalo, New York, on May 26, 1981. The charges were filed, respectively, on August 18, 1980, by Universal Liquor Corp. and on August 26, 1980, by Erie Liquor Co., Inc. (herein respectively Universal and Erie and, collectively, the Companies). The complaint, which issued on September 24, 1980, alleges that Truck Drivers Local Union No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (herein the Union), and Al Sgaglione, Executive Administrator of the New York State Teamsters Conference Pension & Retirement Fund, Irving Wisch, Kepler Vincent, T. Edward Nolan, Rocco DePerno, Victor Mousseau, Paul E. Bush, Jack Canzoneri, Trustees of the New York State Teamsters Conference Pension & Retirement Fund (allegedly) acting as agents (herein collectively the trustees) violated Section 8(b)(1)(A) and (3) of the Act. The gravamen of the complaint is that Respondents, by a series of actions, have attempted to modify or alter, and have modified and altered, provisions of collective-bargaining agreements between the Union and the Companies, by requiring and insisting that the Companies make pension fund contributions on behalf of their seasonal, casual, and part-time employees. Respondents' respective answers deny the commission of the alleged unfair labor practices, and further deny that the trustees are agents of the Union. All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs. The trustees submitted a prehearing memorandum of law, and the General Counsel, the Companies, and the trustees filed post-hearing briefs.

Upon the entire record in this case[1] and from my observation of the demeanor of the witnesses, and having considered the arguments of counsel, the memorandum of the trustees, and the briefs submitted by the General Counsel, the Companies, and the trustees, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE EMPLOYERS INVOLVED

Universal, with its principal office and place of business in Buffalo, New York, and Erie, with its principal office and place of business in West Seneca, New York, are New York corporations engaged at their respective locations in the wholesale distribution of wines and liquors. In the operation of their respective business, the Companies each annually receive goods and materials valued in excess of $50,000 directly from points outside New York. It is undisputed, and I so find, that the Companies are each employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. RESPONDENT UNION AND THE BARGAINING UNITS INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act. It is undisputed, and I so find, that the following constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

a. All truck drivers and warehousemen employed by Universal at its Hertel Avenue, Buffalo, New York facility, excluding guards and supervisors as defined in the Act.

b. All truck drivers and warehousemen employed by Erie at its Empire Drive, West Seneca, New York facility, excluding guards and supervisors as defined in the Act.

It is also undisputed, and I so find, that since on or about August 1, 1976, the Union has been and is the lawfully designated and recognized exclusive collective-bargain-

[1] Certain errors in the transcript are hereby noted and corrected.

ing representative of all the employees in the above-described units.

III. THE ALLEGED AGENTS OF THE UNION

The status of the trustees is in dispute, and will be discussed in connection with the merits of this case.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background: Developments prior to the 1979 contract negotiations, and alleged relevant litigation

The bargaining unit at Erie normally consists of five to seven full-time, one part-time, and one seasonal warehousemen. The unit at Universal normally includes 9 to 12 full-time warehousemen. In addition, Universal draws warehousemen from a list of some six to eight casual employees. Neither Company employs its own truckdrivers, or is a member of any multiemployer bargaining association. In 1976 the Union engaged in joint contract negotiations with Erie, Universal, and two other firms engaged in the liquor distribution industry. As a result of these negotiations, Erie and Universal each executed substantially identical collective-bargaining contracts with the Union, effective from August 1, 1976, through July 31, 1979. The contracts each contained the following pertinent provision:

> Article VI
>
> The Employer may hire employees to work as a seasonal, casual or part-time worker, provided in no case shall such an employee be hired for the purpose of displacing a regular full-time employee or for reducing the normal complement of regular, full-time employees. Such an employee shall not become a seniority employee under this Agreement where it has been agreed by the Employer and the Union that such employee was hired for seasonal, casual or part-time work. The work [sic] "seasonal," as used herein, is meant to cover situations such as the "Christmas period" and other seasonal occasions where the Employer has a temporary high level of business operations. The words "casual or part-time," as used herein, are meant to cover situations such as replacements for absenteeisn, for vacations and illnesses, and for an unbalanced work load during a portion of the work week. *Such seasonal, casual or part-time employees shall not be entitled to any fringe benefits under this Agreement or contributions with respect thereto, except as required by law.* . . . [Emphasis supplied.]

The contracts did not define the term "fringe benefits." Notwithstanding the foregoing provision, article XV of the contracts provided for employer contributions to the New York State Teamsters Council Welfare Trust Fund (herein welfare fund), computed on a daily basis for "all casual employees," and contributions computed on a weekly basis for "regular employees." Erie Comptroller Phillip Kloss testified that, in accordance with the 1976 contract, his Company contributed to the welfare fund for casual employees. Universal Warehouse Manager James Bruno testified that Universal sometimes made contributions to the welfare fund for casual employees, but did not do so on a regular basis. If so, Universal's failure to regularly make contributions for casual employees was inconsistent with the express provisions of article XV of the contract.

Article XVI of the contracts provided for employer contributions to the New York State Teamsters Council Pension and Retirement Fund (herein called the pension fund). Paragraph 1 provided as follows:

> 1. Effective August 1, 1976, the Employer agrees to contribute to the New York State Teamsters Council Pension and Retirement Fund, *the sum of fifty-five cents (55¢) per hour paid to any and all of its employees covered by this Agreement,* but not to exceed twenty-two dollars ($22.00) per week; and effective August 1, 1978, the sum of sixty-two and one-half cents ($.625) per hour but not to exceed twenty-five dollars (25.00) per week; and effective July 31, 1979, the sum of seventy-seven and one-half cents ($.775) per hour but not to exceed thirty-one dollars ($31.00) per week. [Emphasis supplied.]

The term "any and all of its employees covered by this Agreement" is significant. If the parties intended to exclude seasonal, casual, and part-time employees from pension fund coverage, they could have referred to "regular," "full time," or "regular full time" employees. Indeed the term "regular employee" was used elsewhere in the contracts, including paragraph 10 of article XVI (relating to pension coverage when a "regular employee" is absent due to illness or off-the-job injury).[2] However, the parties did not so limit paragraph 1 of article XVI. The term "any and all employees [of the Companies] covered by this Agreement" included seasonal, casual, and part-time employees. They were and are included in the bargaining unit, and the contracts contained various provisions which specifically concerned the wages and working conditions of casual employees.

Article XVI also contained the following provisions which are at least arguably relevant to the present case:

> 2. Failure on the part of the Employer to regularly contribute as specified herein above shall make him liable for all claims, damages, attorney fees, court costs, etc., plus all arrears in payments, plus a ten percent (10%) penalty. In the event the Union suspends the operations of a defaulting Employer, the Union shall not be bound by any arbitration or no strike clause in this Agreement. The Employer and the Union hereby agree simultaneously herewith to execute a stipulation submitted by the Pension Trustees setting forth the provisions relating to the Pension Fund as negotiated for the General Freight Agreement and certifying that the Employer has entered into a written agreement containing such provisions. The Fund Trustees may reserve

[2] The contracts (art. XIV) also used the term "steady employees."

the right to refuse to accept contributions from Employers who fail to execute such stipulations.

* * * * *

4. The Pension Fund shall be open to participation by any group of members belonging to a participating Local and any or all other employees of a participating Employer not members of the Union, provided all such employees are covered under rules, regulations, and other requirements that are or may be required by the Trustees.

* * * * *

7. By the execution of this Agreement, the Employer authorizes the Employer's Associations which are parties hereto to designate the Employer Trustees under such Trust Agreement, hereby waiving all notice thereof and ratifying all actions already taken or to be taken by such Trustees within the scope of their authority.

After executing their respective collective-bargaining contracts, Erie and Universal, together with the Union, each signed and submitted a "stipulation," i.e., participation agreement to the Pension Fund. The stipulations each contained the following arguably pertinent provisions:

1. The employer agrees to contribute for any and all of his regular full-time *and any and all other employees covered by this Agreement* to the New York State Teamsters Conference Pension & Retirement Fund, as follows: [Followed by contribution rates as set forth in art. XVI, par. 1, of contract.] [Emphasis supplied.]

* * * * *

7. The Pension Fund shall be open to participation by any group of members belonging to a participating Local Union and the employer may contribute to the New York State Teamsters Conference Pension & Retirement Fund for employees working outside the jurisdiction of the Collective Bargaining Agreement in the amounts indicated above. However, if these employees are included, the employer agrees to make contributions on *all employees* in this category subject to the same conditions and on the same basis as is provided in this stipulation, and the employer also agrees to continue to make contributions on *all of these employees* for as long as there shall be a Collective Bargaining Agreement or Agreements between the employer and the Union, subject to any and all rules and regulations or decisions covering this group that are issued by the Board of Trustees.

8. The employer agrees that should he not make contributions on 100% of all his non-union employees as required herein, the New York State Teamsters Conference Pension & Retirement Fund will not pay nor be liable or obligated to pay any Pension & Retirement or other benefits to all his nonunion employees whatsoever, whether or not contributions were made on such individuals, in which event the employer shall pay to any or all such nonunion employees any and all Pension & Retirement or other benefits that such employee or employees may have been entitled to or are later entitled to until such time that the Conference Pension & Retirement Fund once again extends coverage to this group and only under terms decided solely by the Board of Trustees of the New York State Teamsters Conference Pension & Retirement Fund.

* * * * *

18. This memorandum shall become effective as of the date of execution thereof and the payments above provided shall be payable from on and about 8-1-76. This agreement shall continue in full force and effect for the same term as the Labor Agreement and shall continue in force and effect for the life of all future agreements replacing the present Labor Agreement with the exception that any and all conditions or contributions over and above those specified herein shall be applicable.

Notwithstanding paragraph 18, above, the stipulations provided in the caption portion that "all stipulations must have an expiration date," and that the "Date of Expiration" is July 31, 1979; i.e., the expiration date of the collective-bargaining contracts. The stipulations also each contain a certification that "the provisions, terms and wording in this Stipulation is identical to that in Collective-Bargaining Agreement." The stipulations, which consisted of printed form language with the insertion of dates, amounts, and identification of parties, did not indicate that seasonal, casual, and part-time employees were excluded from coverage, nor did the stipulations purport to define those employees who were covered, except insofar as the above-quoted provisions purport to do so. Paragraph 1, on its face, does not clearly indicate whether the term "this Agreement" refers to the collective-bargaining contract or the stipulation. However, in paragraph 18 the phrase "This agreement" is used in conjunction with a reference to the "Labor Agreement." I find that the term "this Agreement" in paragraph 1 refers to the stipulation. Therefore, the stipulation on its face did not purport to define the extent of coverage beyond that of regular full-time employees. Rather, the extent of coverage was as agreed upon by the participating employer and union, subject to the conditions set forth in paragraph 7 (relating to nonunit union members), and paragraph 8 (relating to nonunion employees of the employer).

Erie made pension contributions only on behalf of its full-time employees. Warehouse Manager Bruno testified that Universal normally made contributions only for full-time employees, although from time to time a pension contribution might be made for a casual employee by reason of a clerical error. In October 1978 the trustees of the pension fund and of the New York State Teamsters Council Health and Hospital Fund instituted a lawsuit

against Erie in the New York State Supreme Court, county of Oneida, alleging that Erie failed to make full payments to their respective funds. In its answer, Erie denied owing any money to the funds. Erie contended that its contract with the Union excluded fringe benefits for employees other than "regular and steady employees," and therefore that Erie did not owe any money to the funds. However, the parties did not press this litigation, and consequently the proceeding did not result either in an adjudication or a settlement. However, the fact of the litigation has significance in two respects. First, it is evident that as a result of the litigation, if for no other reason, Erie and the trustees each had knowledge of their respective and conflicting positions with regard to the employer's alleged obligation to make pension fund contributions for all unit employees. The law firm which represented Erie in this litigation was a different firm from that which represented Erie and Universal in the subsequent 1979 negotiations. However, by the time of the 1979 negotiations, the Companies' chief negotiator, attorney Genuino Grande, was aware of the history of relevant litigation. Therefore Erie's knowledge is imputable to Universal. Second, it is also evident that there was no established or agreed-upon practice under the 1976 contract, because Erie's refusal to make pension contributions was challenged in litigation.

The Companies presented evidence of other litigation, not involving them, but which they contend is relevant to the issues in the present proceeding. In 1978 a group of employers (Boulter Carting Co., Inc., *et al.*), who were parties to a contract with Teamsters Local Union No. 118, instituted an action for declaratory judgment against R. F. DePerno as treasurer of the pension fund. The action, which was instituted in the New York State Supreme Court, county of Monroe, requested a judgment that under their contract with Local 118 they were required to contribute to the pension fund for union employees only. On August 2, 1978 the court, per Justice Robert H. Wagner, granted summary judgment in favor of the plaintiffs. Justice Wagner concluded that the contract between the plaintiff employers and Local 118 covered only "union employees," and therefore that the employers were "obligated to make pension contributions on behalf of union employees only." Justice Wagner also held (contrary to my interpretation, above) that the words "any and all other employees covered by this agreement," in paragraph 1 of the trust fund stipulation, referred to the collective-bargaining contract between the employers and Local 118, known as the General Trucking Agreement. On appeal, the Supreme Court, Appellate Division, Fourth Department, reversed and remanded the proceeding to Justice Wagner, directing him to take parole evidence concerning the meaning of the General Trucking Agreement and the stipulation. Justice Callahan, dissenting, expressed the view that the contract covered all employees doing unit work, and therefore that he would enter summary judgment in favor of the defendant. On remand, Justice Wagner found, on the basis of uncontroverted testimony that the employers and the Union verbally agreed that their pension plan would cover only union employees, and, upon evidence of a corresponding practice which went back many years, that the pension plan covered only "union employees, including union casuals." (Justice Wagner noted that at the time of his initial decision he was under the incorrect impression that all of the casual employees were nonunion.) Justice Wagner held, on the basis of his findings, that (as he originally held) the employers were obligated to make pension fund contributions only for union members. He concluded that the arrangement between the employers and Local 118 was lawful, citing *B. G. Costich & Sons, Inc.* v. *N.L.R.B.*, 613 F.2d 450 (2d Cir. 1980). He distinguished *Talarico* v. *United Furniture Workers Pension Fund A*, 479 F.Supp. 1072 (D.C. Neb. 1979), referred to *infra*, principally on the ground that the present pension fund looks to the collective-bargaining contract to identify those employees for whom contributions must be made. Justice Wagner issued his decision on May 9, 1980. The present record does not indicate whether any further appeal was filed in the matter. The Companies also presented in evidence a memorandum decision of the New York State Department of Labor, Industrial Board of Appeals, dated May 15, 1980, in the matter of *S. M. Flickinger Co., Inc.* v. *Phillip Ross, Industrial Commissioner*. This was a petition to review orders directing compliance with New York State Labor Law. The industrial commissioner found that Flickinger unlawfully failed to make pension fund contributions for its employees. The pension fund was a party to the proceeding. The board of appeals found that Flickinger was party to contracts with "local labor unions" which provided for pension fund benefits. The unions are not identified either in the memorandum decision or elsewhere in the present record. The board of appeals revoked the industrial commissioner's orders, finding that Flickinger was obligated, under its collective-bargaining contracts, to make pension fund contributions only for regular full-time employees. That board also found contrary to Justice Wagner, that the words "this agreement" in paragraph 1 of the trust fund stipulation referred to the stipulation itself, rather than to the collective-bargaining contract. The board further rejected testimony by a witness for the pension fund to the effect that its rules required that contributions be made for all unit employees. The Board found that the alleged rules were neither explained nor proven, and that employers had contributed otherwise for over 7 years.

The decisions in *Boulter* and *Flickinger* may be considered as asserted case authority. However, neither decision is dispositive of any of the issues in this case. The doctrines of *res judicata* and collateral estoppel are inapplicable. Neither proceeding involved the contracts between the Companies and the Union. The contracts involved in *Boulter* and *Flickinger* are not in evidence in this proceeding. Therefore it is not even possible to compare the pertinent contract provisions in those cases to the provisions involved in the present case. To the extent that the former provisions are described in those decisions, it is evident that the provisions differed substantially from those involved in the present case. The tribunals in *Boulter* and *Flickinger* each interpreted paragraph 1 of the trust fund stipulation, but they reached differing con-

clusions.[3] None of the other proceedings involved the crucial question of whether the trust fund could lawfully change the language of its stipulation. Neither the Union nor any other Teamsters union was a party to the prior litigation. However, in the present proceeding, unlike the other cases, the Union is the primary respondent, and the trustees are chargeable with unfair labor practice conduct only if it is shown that they acted for and on behalf of the Union.

2. The 1979 contract negotiations and the alleged unlawful conduct

In July 1979, Erie, Universal, and a third employer, Jack's (which employed drivers who made deliveries for Erie and Universal), jointly negotiated and executed new collective-bargaining contracts with the Union. The contracts were effective by their terms from August 1, 1979, through July 31, 1982. The Companies' attorney and chief negotiator, Grande, was the only witness who testified concerning the negotiations. With regard to health and welfare, the parties negotiated the following new provision:

ARTICLE 24

Health and Welfare

24.01 The present 29.60 New York State Teamster Council Welfare Trust Plan shall be continued for a period of ninety (90) days on the same basis as provided in Article XV, Sections 1-12 of the preceding Agreement between the parties. Effective November 1, 1979, a new plan will be implemented which will be comparable or better than the 29.60 Teamster Plan.

As to pensions, the parties, after a brief strike, agreed to provisions substantially as proposed by the Union. The provisions, now contained in article 25, were identical with those in the former contract except as to the amount and effective dates of the contributions. Specifically, the first paragraph of article 25 provided as follows:

25.01 The Employer agrees to contribute to the New York State Teamster Council Pension and Retirement Fund, the sum of seventy-seven and one-half cents ($.775) per hour paid to any and all its employees covered by this Agreement, but not to exceed Thirty-one Dollars ($31.00) per week. Effective August 1, 1980, the amount shall be increased to the sum of One Dollar, Two and one-half cents ($1.025) per hour but not to exceed Forty-one Dollars ($41.00) per week.

According to negotiator Grande, the parties did not discuss the question of coverage for seasonal, casual, and part-time employees. The trustees or their representatives were not present, nor were they consulted with respect to the negotiations. No evidence was presented which would indicate that the pension fund had any knowledge of the terms of the new contract prior to the Companies' receipt of new participation agreement forms. However, as previously found, Erie and Universal were aware of trustees' position that they were obligated to make pension contributions for all unit employees. In all material respects, the other 1976 contract provisions previously discussed, including the quoted portion of former article VI (now 4.02), were carried over into the 1979 contract.

By letter dated October 15, 1979, the Union by its business agent, Erwin Walker, requested Erie to sign, together with the Union, an enclosed Pension Fund "participation agreement," and a similarly worded participation agreement for the New York State Teamsters Health and Hospital Fund. These documents differed substantially from the stipulation forms which the Companies and the Union executed in connection with their 1976 contracts. The pension fund participation agreement included the following pertinent provisions:

1. (a) This Participation Agreement hereinafter called a Stipulation signed by the Local Union and the employer involved, is the basis for participation in the New York State Teamsters Conference Pension and Retirement Fund. The employer, the Union and the employees, as a condition of participation in this Fund, are bound by all the rules and regulations of the Fund now and/or hereinafter, adopted by the Board of Trustees of the Pension Fund.

(b) The undersigned, employer and Union, understand and agree that Pension contributions shall be made as set forth herein, on all employees doing bargaining unit work, and on any and all other employees doing the same work as bargaining unit employees, whether or not they are included in the bargaining unit, whether or not they are union members, whether full time, part time, casual or seasonal. No agreement between the employer and the Union shall alter this rule or any other rule or provision of this Stipulation. That in the event there is any agreement between employer and Union that is contrary to or inconsistent with the terms of this Stipulation or the rules of the Pension Fund, such inconsistent provisions shall be null and void and superseded by the terms of this Stipulation and/or the rules of the Fund.

* * * * *

7. The Pension Fund shall be open to participation by any group of members belonging to a participating Local Union that fully complies with all rules and regulations of the Fund and the employer may contribute to the Pension and Retirement Fund for employees working outside the jurisdiction of the Collective Bargaining Agreement in the amount indicated above. However, if these employees are included, the employer agrees to make contributions on *all employees* in this category subject to the same conditions and on the same basis as is provided in

[3] The General Counsel and the Companies also disagree on this question. The General Counsel contends (br., p. 5) that "this agreement" refers to the collective-bargaining contract. The Companies argue (br., fn. 5) that, on the authority of *Flickinger*, "this agreement" refers to the stipulation.

this Stipulation and the employer also agrees to continue to make contributions on *all these employees* for as long as there shall be a Collective Bargaining Agreement or Agreements between the employer and the Union, subject to any and all rules and regulations or decisions covering this group that are issued by the Board of Trustees. The employer must request in writing and receive approval from the Board of Trustees in writing in order to have any non-covered employees included and such request must specifically define the category or categories involved.

8. The employer agrees that should he not make contributions on 100% of all his Bargaining Unit employees as required herein, the Pension and Retirement Fund will not pay nor be liable or obligated to pay any Pension and Retirement or other benefits to all his employees involved, whether or not contributions were made on such individuals, in which event the employer shall pay to any or all such employees any and all Pension and Retirement or other benefits including vested benefits that such employee or employees may have been entitled to or are later entitled until such time that the Board of Trustees of the Pension Fund once again extends coverage to this group and only under terms decided solely by the Board of Trustees of Pension & Retirement Fund.

* * * * *

18. The Stipulation and Agreement shall become effective as of the date of execution thereof and the payments above provided shall be payable from on and after 8-1-79, and expire on 7-31-82. This agreement shall continue in full force and effect for the same term as the Labor Agreement. A new Stipulation must be signed and submitted for each subsequent Collective Bargaining Agreement. Effective Date of Collective Bargaining Agreement 8-1-79 Expiration Date of Collective Bargaining Agreement 7-31-82.

19. No employer and none of his employees shall be entitled to participate in this Fund unless the employer and the Union have signed the standard and current Stipulation.

20. All provisions in this Stipulation must be enforced by the Local Union involved. Failure of the Local Union to enforce compliance with all provisions herein may compel the Board of Trustees to terminate participation in this Fund by the employer and his employees and/or the Local Union.

We hereby certify that the provisions, terms and wording in the Collective Barganing Agreement are not contrary to or inconsistent with the provisions, terms and wording in this Stipulation.

Erie did not sign the participation agreements. By letter dated October 31 Erie's counsel informed the administrator of the funds that Erie would make contributions to the funds for regular full-time unit employees, if necessary without a stipulation, but that Erie's position was that its contract exempted contributions for seasonal, casual, and part-time employees. Erie's counsel submitted that the proposed participation agreements would nullify the contractual exemption, and he requested that they be amended to conform with the contract. By letters dated November 28, the acting administrator of the pension fund expressed disagreement with the Company's position, including its assertion that Erie's contract excluded nonfull-time regular employees from coverage. He informed Erie that in the absence of an appeal to the trustees, if Erie did not sign the pension fund participation agreement by December 10, Erie would be precluded from participation in the fund, and its employees would be notified that Erie was in noncompliance and all benefits would cease. Additional correspondence between Erie and the pension fund failed to result in any change in position by the parties, although the pension fund extended its deadline to January 21, 1980. In the meantime, in accordance with their contract, Erie and the Union negotiated different health and welfare coverage, and therefore this aspect of the problem became moot. Erie subsequently tendered monthly pension fund reports and contributions for full-time employees, but the pension fund refused to accept these contributions and reports in the absence of a signed participation agreement. By letters dated February 8 and July 11, 1980, Union Business Agent Walker requested Erie to sign the new participation agreement. In his February 8 letter, Walker indicated that the pension fund informed the Union that it would refuse contributions if it did not receive a signed participation agreement. So far as is indicated by the present record, Walker's letters of October 15, February 8, and July 11 constituted the Union's only communication with Erie concerning the matter. At no time did the Union threaten to take any action against Erie if or because it failed to sign the participation agreement. By letter dated May 13, 1981, the pension fund's executive administrator informed Erie that the fund's records indicated that Erie ceased making contributions in accordance with its contract and the standard participation agreement, and that the pension fund was in the process of determining Erie's withdrawal liability.

In the meantime the Union requested but Universal failed to sign the new participation agreement. As with Erie, the Union did not threaten to take any action against Universal if or because it refused to sign the agreement. By letter dated July 1, 1980, the pension fund informed the Union (copy to Universal) that, unless the signed participation agreement was received within 10 days, the Fund would no longer accept contributions and would inform all employees that they were no longer covered for benefits. By letters dated August 11, the pension fund's executive administrator informed Universal's employees that, because of Universal's refusal to sign the participation agreement, they could no longer participate in the fund. Thereafter the pension fund refused to accept monthly reports and contributions proffered by Universal. However, at this point Universal instituted an action in the United States District Court for the Western District of New York, and obtained a temporary restraining order which enjoined the pension fund from re-

fusing to accept such contributions. As of the time of this hearing, no final decision had issued in that proceeding.

3. Additional evidence concerning the status of trustees

The pension fund was established pursuant to a 1954 agreement and declaration of trust which has been amended from time to time. The collective-bargaining contracts of 14 Teamsters local unions, including the Respondent Union, Local No. 449, provide for employer contributions and employee benefits under the fund. The fund is administered by a board of trustees which consists of four employer and four union trustees. The union trustees are each business agents of Teamsters locals who participate in the fund. At all times material, no official of the Union or of the Companies served as a trustee, although Union Business Agent Walker served as a trustee of the Welfare Fund. The agreement and declaration of trust provides that the trustees "will receive and hold the Employer contributions and other money or property which may come into their hands as trustees hereunder . . . with the following powers and duties and for the following uses, purposes and trusts, and none other. . . ." The list of duties includes a direction that the trustees "shall establish a funding policy and method consistent with the objectives of the Plan and the requirements of Part 3 Title 1 of ERISA." The trust agreement also indicates that the employer contributions payable to the fund "are for the purpose of providing pensions or retirement benefits to the employees covered therefor under collective-bargaining agreements or supplements thereto, between the [participating unions] and contributing employers."

With respect to the new standard participation agreement, no evidence was presented which would indicate when or how the pension fund decided to utilize that form, although the trustees' answer to the complaint infers that the new form was instituted after the Companies and the Union executed their 1979 contract. Nor was any evidence presented which would indicate that the Union participated in the trustees' decision to utilize that form. Also, no direct testimony was adduced concerning the reason or reasons for the trust fund's present policy. However, as will be discussed, such reasons may be inferred from the various documents and records of litigation which are in evidence in this proceeding.

B. *Analysis and Concluding Findings*

The General Counsel's position in this case necessarily rests on its threshold contention that, under the current collective-bargaining contracts between the Companies and the Union, seasonal, casual, and part-time employees are excluded from coverage under the pension plan. I do not agree with this contention. As previously indicated, the contracts have not been interpreted in any other litigation. Also, there is no established practice under the contracts, because the Companies' failure to make pension contributions for their casual employees was challenged by the pension fund and has been in a state of continuous and unresolved litigation since 1978. The contracts do not define the term "fringe benefits." Normally that term refers to deferred, contingent compensation which employees are entitled to receive in addition to their wages. *Hobbs* v. *Lewis*, 159 F.Supp. 282, 286 (D.C. D.C. 1958); see also *Trinity Services, Inc.* v. *Marshall*, 593 F.2d 1250, 1257–58 (D.C. Cir. 1978). Such definition would include pension and welfare funds. Therefore the present article 4.02, formerly article VI, would appear to exclude seasonal, casual, and part-time employees from pension and welfare plan coverage. However, the provisions in question cannot, as the General Counsel seems to suggest, be viewed in total isolation from the rest of the contracts. If the parties intended to limit coverage under the welfare plan to regular full-time employees, then why did they provide in the 1976 contract for a specific formula for contributions for casual employees? Indeed, the parties renegotiated these provisions and continued them in effect for a 90-day period under the 1979 contract. Why also did the parties provide for pension plan contributions on behalf of "any and all of [the Companies'] employees covered by this Agreement"? If the parties meant to limit pension plan coverage to regular full-time employees, they could have so indicated by appropriate language. Thus, under both the 1976 and 1979 contracts, those sections dealing with such "fringe benefits" as vacations and holidays make specific reference to the applicable benefits for "steady employees," "regular employees," and "casual employees." I find that the specific contract language relating to pension and welfare, like that relating to vacations and holiday pay, supersedes the undefined reference to "fringe benefits." Therefore in view of the specific language relating to pension fund contributions, I find that all unit employees, including casuals, were and are covered by the contractual pension plan.[4] This finding is reenforced by the evidence concerning the 1979 contract negotiations. By this time the Companies were fully aware of the position taken by the pension and welfare funds that the employers were required to make contributions on behalf of all unit employees. Nevertheless the Companies agreed to carry over the pertinent pension fund provisions of the 1976 contracts, including their commitment "to execute a stipulation submitted by the Pension Trustees setting forth the provisions relating to the pension fund as negotiated for the General Freight Agreement and certifying that the Employer has entered into a written contract containing such provisions." The Teamsters National Master Freight Agreement, with New York State Supplement, effective from April 1, 1979, through March 31, 1982, which was presented in evidence in this proceeding, provides under article 52 relating to "Pension and Retirement Fund," for employer contributions for all unit employees. In effect, by agreeing to their current contracts, the Companies were inviting the pension fund to submit, as it did, a stipulation form which would clarify the fund's own position that the Companies were obligated to make contributions on behalf of all unit employees, including casuals.

[4] The Board, and therefore an administrative law judge, has authority to resolve questions of contract interpretation in order to pass upon and if necessary remedy alleged unfair labor practices. See *N.L.R.B.* v. *C & C Plywood Corp.*, 385 U.S. 421 (1967).

Therefore it follows that I should recommend dismissal of the complaint without reaching the question of agency, because the trustees properly interpreted the Companies' obligations under their collective-bargaining contracts. In sum, the trustees did not attempt to "modify or alter" the contracts. However, even if the Companies' interpretation of the contracts were correct, I would nevertheless recommend dismissal of those allegations involving the trustees' actions, because the evidence indicates that the trustees were not the agents of the Union at any time or in any way material to this proceeding.

The General Counsel's argument in support of its agency theory suggests that the General Counsel finds itself on the horns of a dilemma. The General Counsel contends, in sum, that the trustees are agents of the Union because "the trustees derive their authority from the collective-bargaining agreement." (Br., p. 5.) In support of this contention, the General Counsel argues that the term "this agreement" in the old stipulation refers to the collective-bargaining contract. If so, then the General Counsel's case would fail for lack of merit without reaching the agency issue, because paragraph 1 of the stipulation, as interpreted by the General Counsel, would require contributions for all unit employees, i.e., "all regular full-time and any and all other employees covered by [the contract]."

Moreover, with regard to the agency issue, the General Counsel's theory suffers from a fatal flaw. All union-employer trust funds derive their authority from collective-bargaining contracts. Without such contracts the funds would not receive contributions or disburse benefits. Under the General Counsel's theory, all such trust funds are the agents of the contracting parties. Indeed, the General Counsel argued as much at the hearing, although without explanation, he argued only that the trustees were agents of "the Union." However, the Board has never taken such a *per se* approach. See *Sheet Metal Workers' International Association and Edward J. Carlough, President (Central Florida Sheet Metal Contractors Association, Inc.)*, 234 NLRB 1238, fn. 30 (1978). If the General Counsel's theory ever had any viability, that theory was put to rest in the recent Supreme Court decision in *N.L.R.B.* v. *Amax Coal Company, a Division of Amax, Inc.*, 453 U.S. 322 (1981), which issued after the hearing in the present case. *Amax* involved the question of whether employer-selected trustees of a trust fund created under Section 302(c)(5) of the Act are "representatives" of the employer "for the purposes of collective bargaining or the adjustment of grievances" within the meaning of Section 8(b)(1)(B) of the Act. The Supreme Court held that they were not. However, in deciding this issue the Supreme Court did not limit its rationale to the status of employer trustees or to alleged violations of Section 8(b)(1)(B). Rather, after reviewing in detail the language and legislative history of Section 302(c)(5) and the Employee Retirement Income Security Act of 1974 (ERISA), the Court held that such language and history "demonstrate that an employee benefit fund trustee is a fiduciary whose duty to the trust beneficiaries must overcome any loyalty to the interest of the party that appointed him." 453 U.S. at 334. The Court further noted: "If the administration of Section 302(c)(5) trust funds were 'collective bargaining' within the meaning of federal labor law . . . the NLRB would have to review the discretionary actions of the trustees according to the statutory duty of good-faith bargaining [citing Sections 8(a)(5), 8(b)(3) and 8(d) of the Act]. The Board would thereby be thrust 'into a new area of regulation which Congress [has] not committed to it.'" (*Amax*, 453 U.S. at 337, fn. 21). That is precisely the problem which is presented by the General Counsel's theory of this case. It is true that there is a significant difference between employer officials who act as trustees, and their union counterparts. Unlike the employer officials, union officials, when acting in such capacity, owe a fiduciary obligation to those employees who are represented by their union. However, that obligation does not coincide with, and indeed is significantly different from, their fiduciary obligation when functioning as trustees. In the present case, the trustees administer funds for beneficiaries who are represented by a total of 14 Teamsters local unions in a multitude of bargaining units. The present Union represents only a fraction of these employees. The interests of the Union, or of those employees represented by the Union, do not necessarily coincide with the interests of pension fund beneficiaries as a whole. Therefore there is no basis for finding that the Teamsters-designated trustees, when acting in their capacity of trustees, are also acting on behalf of their respective local unions, or of one particular local union.

The Companies' agency theory differs from that principally advanced by the General Counsel. The Companies argue, in sum, that the trustees acted *ultra vires* by refusing to accept contributions from the Companies in the absence of a signed stipulation. The Companies reason that, therefore, the trustees must have been acting as the agents of the Union. I find this argument without merit in light of the facts of this case. First, the trustees had implied authority under their agreement and declaration of trust to refuse to accept contributions which did not accord with the trustees' funding policy and method. The trustees had a policy whereby employers were required to make contributions on behalf of all unit employees. As indicated, no testimony was adduced which would indicate the reasons for this policy. However, in *Boulter* v. *DePerno, supra*, Justice Wagner referred to testimony by the trust fund's witness, that the fund relies upon its stipulations in making actuarial assumptions. It is evident that the fund's fiscal viability would be enhanced by the maximum possible contributions, particularly when contributions are obtained for those employees who are least likely to eventually draw benefits. See *B. G. Costich & Sons* v. *N.L.R.B., supra*, 613 F.2d at 455. During the term of the 1976 contract, the trustees invoked their position by instituting a lawsuit against Erie. After July 31, 1979, the trustees had no basis for similar action, because the 1976 stipulations had expired by their terms, and the trustees did not receive new signed stipulations. Therefore, the trustees invoked their position by refusing to accept contributions in the absence of such stipulations. Under the 1979 contracts, as under the 1976 contracts, the Companies were contractually obligated to

execute new stipulations which were submitted by the trustees.

Assuming *arguendo* that the trustees acted arbitrarily or in excess of their authority, it does not follow, as argued by the Companies, that they must have done so as agents of the Union. See *Talarico* v. *United Furniture Workers Pension Fund A, supra,* 479 F.Supp. at 1080.[5] The present record is devoid of evidence that the trustees acted on behalf of or in furtherance of the specific interests of the Union (Local 449), as distinguished from the interests of the pension fund beneficiaries. Rather, the evidence indicates that the trustees acted on their own initiative, and in furtherance of a policy which they considered to be in the best interests of the beneficiaries as a class.[6] If the Companies believe that the trustees have acted in excess of their authority, or have abused their discretion in administering the pension fund, they have recourse to the courts, which are not limited by the necessity of determining whether the trustees acted as agents of a labor organization. Indeed the Companies have already taken that route.

Again assuming *arguendo* that the collective-bargaining contract excluded seasonal, casual, and part-time employees from coverage under the pension plan, I would further find that the Union did not violate the Act by its independent actions. These actions consisted of the letters, described above, which Business Agent Walker sent to the Companies, in which he requested the Companies to sign the new participation agreement. It is not an unfair labor practice for a union to request modification of a collective-bargaining contract, or to request an employer to take action which would result in modification of their contract. The Union did not threaten to take any action against the Companies if they failed to sign the participation agreements. The Union was simply concerned that, if the Companies failed to do so, the trustees would cancel coverage, and consequently the employees would be deprived of a contractual benefit. Thereby the Union, by requesting the Companies' cooperation, was simply carrying out its legitimate functions as a collective-bargaining representative.

CONCLUSIONS OF LAW

1. The Companies are each employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Trustees are neither a labor organization nor agents of a labor organization within the meaning of Section 2(13) of the Act.

4. Respondents have not engaged in the unfair labor practices alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]

[5] As heretofore indicated, Justice Wagner, in *Boulter,* distinguished *Talarico* principally on the ground that the present pension fund looks to the collective-bargaining contract to identify those employees for whom contributions must be made. For the reasons discussed in this Decision, and particularly in light of *Amax,* I do not see any valid pertinent distinction.

[6] Therefore, the cases principally relied upon by the General Counsel and the Companies are distinguishable on their facts from the present case. In *Local 80, Sheet Metal Workers International Association, et al. (Turner-Brooks, Inc.),* 161 NLRB 229, 234 (1966), the Board found that the trustees therein refused to accept employer contributions to pension and vacation funds, in furtherance of Local 80's demand that the employer agree to contribute to an industry promotion fund. In *Jacobs Transfer, Inc.,* 227 NLRB 1231, 1232 (1977), the Board found that the trustees therein refused to accept employer contributions on behalf of a discriminatorily terminated employee, in furtherance of a union's efforts to frustrate a Board backpay award in favor of that employee. See also *Sheet Metal Workers International Association (Central Florida Sheet Metal Contractors Association, Inc.), supra,* 234 NLRB at 1246, fn. 30. No comparable situation is shown by the evidence in the present case.